Tribunal Constitucional, 27 January 2014: Joinder of Claims and Fundamental Right of Citizens to Effective Judicial Protection

On the 27 January 2014 the Spanish Constitutional Court (*Tribunal Constitucional*) has issued an important decision in the context of collective proceedings brought before the *Audiencia Nacional* regarding the liability of the Spanish public administration (AENA and Ministerio de Fomento) in the air traffic controllers' case in 2010- The *Tribunal Constitucional* has upheld the appeal for *amparo*– protection of constitutional rights- declaring null and void two decisions of the *Audiencia Nacional* which considered that the conditions established in arts 34 ff. of the Act on the Jurisdiction for judicial review were not met – i.e. claims referring to several acts, provisions or actions shall be joined when some claims are a reproduction, confirmation or execution of other or some other direct connection exists between the claims. When those requisites are met, the court may at any point rule for joinder on an *ex officio* basis or at the request of any party.

Briefly, in its *auto* of 17 September 2012 and *providencia* of 19 June 2012, the *Audiencia Nacional* had denied the request for joinder of claims lodged by hundreds of passengers affected by the airspace closure following the air traffic controllers' strike in December 2010. Nevertheless, the *Audiencia Nacional* had allowed individual air passenger claims against the Public administration as a means of guaranteeing the fundamental right to obtain effective protection from the courts -granted by art 24 of the Spanish Constitution.

Abdelkader Castellanos and others filed the aforementioned appeal for the protection of constitutional rights before the Constitutional Court in 2012. They alleged mainly a violation of their right to obtain effective protection from the judges and courts and their right of access to justice (art. 24 Spanish Constitution). Those violations were allegedly caused by the rejection of the joinder and that the rulings under appeal contravened the duty to state the reasons on which a decision is based- art. 24. 1 of the Spanish Constitution, lack

of *motivación*.

After reviewing the *Audiencia Nacional* legal reasoning, the Constitutional Court concluded that when the *Audiencia* denied the joinder it did not provide the grounds for rejecting that claim, so the fundamental right of citizens to obtain effective judicial protection was effectively violated. Accordingly, it has declared null and void both *Audiencia Nacional* decisions and requested the Court to re evaluate the case and either provide detailed grounds for its initial findings or admit the joinder of claims.

The full Constitutional Court decision is downloadable by clicking here (in Spanish).

LSE/PILAGG Conference on the Idea of Arbitration

On 13 February, the London School of Economics and Sciences Po PILAGG will host a common conference in London at the occasion of the publication of *The Idea of Arbitration* (OUP 2013) by **Jan Paulsson** (U Miami / LSE)

Debating Jan Paulsson's Idea of Arbitration

5:40 pm Welcome

5:50 pm Panel 1
Should arbitrators be allowed to apply the law and decide issues of public policy? Discussants: **Horatia Muir Watt** (Science Po) and **Jan Kleinheisterkamp** (LSE)

6:40 pm Panel 2
Jurisdictional contests: Who decides them? When? And with what degree of finality? Discussants: **Bernard Rix** (20 Essex Street) and **Charles Poncet** (CMS); moderator: **Tariq Baloch** (3VB)

7:30 pm Panel 3
Images in a Crystal Ball Discussants: **VV Veeder** (Essex Court Chambers) and **Derek Roebuck** (IALS); moderator: **Catherine Rogers** (U Penn)

8:20 – 8:30 – Closing remarks by Jan Paulsson

To register, please email to Law.TL.Project@lse.ac.uk

Slovenia: Conference on Evidence in European Civil Law

International scientific conference "**Dimensions of evidence in European civil procedure law**" is scheduled for 20-22 March 2014 in Maribor, Slovenia. The conference will provide an opportunity to review 28 national reports on the issue, and to share and discusse new unifying tendencies in EU law on civil procedure. It is aimed at approving and extending the Report on application of the Council Regulation (EC) 1206/2001, providing additional guidelines for better and swifter implementation of the Regulation, along with conclusions on its possible modernisation.

The conference program and other details, including the EU project within which the conference is taking place, are available at the conference official website.

Michaels on Non State Law in the Hague Principles

Ralf Michaels (Duke Law School) has posted Non-State Law in the Hague Principles on Choice of Law in International Contracts on SSRN.

Article 3 of the Hague Principles on Choice of Law in International Contracts is the first quasi-legislative text on choice of law to allow explicitly for the choice of non-state law also before state courts. This paper, forthcoming in a Festschrift, puts the provision into a broader context, discusses their drafting history and particular issues involved in their interpretation. It also provides a critical evaluation. Article 3 does not respond to an existing need, and its formulation, the fruit of a compromise between supporters and opponents of choosing non-state law, makes the provision unsuccessful for state courts and arbitrators alike.

TDM 1 (2014) – Reform of Investor-State Dispute Settlement: In Search of a Roadmap

Edited by Jean E. Kalicki and Anna Joubin-Bret, this TDM special issue has close to 70 papers making it the largest TDM Special Issue to date. The interest in this topic, and the breadth of proposals offered by our contributors, demonstrates both the importance of holding this dialogue and the creativity of astute users and observers of the present system. It should be of interest to all international disputes lawyers. This Special Issue is particularly timely in light of the European Union public consultation on investor-state dispute settlement and the Transatlantic Trade and Investment Partnership just begun by EU Trade Commissioner Karel De Gucht.

The Table of Contents is available here.

New Book on European Insolvency Law

The evaluation on the application of the European Insolvency Regulation in the 27 Member States conducted by the Universities of Heidleberg and Vienna was just published.

The book is called European Insolvency Law – The Heidelberg-Luxembourg-Vienna Report. It is presented by the authors of the general report: B. Hess, P. Oberhammer and T. Pfeiffer, in cooperation with A. Piekenbrock and C. Seagon.

> *This book presents the results of the External Evaluation of Regulation No. 1346/2000/EC on Insolvency Proceedings (JUST/2011/JCIV/PR/0049/A4) which was commissioned by the EU-Commission in March 2012 as a basis for the pending reform of the European Insolvency Regulation. Most of it was prepared within a period of about half a year in which the editors were in constant contact with the EU-Commission and participated in the process that led to the presentation of the Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings (COM[2012] 744 final) dated 12 December 2012. Therefore, we believe that it is fair to say that both our initial approach to the relevant reform tools and issues and the findings in the course of the preparation of this study had a significant impact on the reform process which in turn of course also influenced the outcome of the study.*
>
> *The book contains the document generally known as the Heidelberg-Luxembourg-Vienna Report on the reform of the European Insolvency Regulation and two other documents which served as a basis for this report, i. e. a detailed systematic summary of the national reports based on extracts from the original text and a systematic compilation of the relevant case-law. Unfortunately, it would have gone far beyond the limits of this book to publish all national reports, although most of them were indeed worth publishing. However, these reports are available online at: http://www.ipr.uniheidelberg.de/InsReg/Study_Annex_II.html.*

The full table of content is available here.

Vacancies at the Hague Conference

The Permanent Bureau of the Hague Conference is seeking to fill two positions

1

Diplomat Lawyer, with excellent knowledge of private international law

The ideal candidate will possess the following qualifications:

- Excellent law school education in private law, including all aspects of conflicts of laws, preferably in the common law tradition; familiarity with comparative law (substantive and procedural law); good knowledge of public international law (in particular, the law of treaties and human rights law).
- Excellent drafting capabilities (*e.g.*, dissertation, law review or other publication experience will be taken into account).
- At least 10 to 15 years experience (in practice of law, academia, or an international organisation); experience with international negotiations an advantage.
- Excellent command, preferably as native language and both spoken and written, of English; good command of French and knowledge of other languages desirable.
- Personal qualities to contribute to:
    - good, pleasant and co-operative working atmosphere both within the Permanent Bureau and with representatives of Members, non-Member States and other Organisations;

- the effective administration of the Permanent Bureau;
- the proper representation of the Hague Conference to other international organisations.

The person appointed will be expected to take a leadership role in respect of particular areas of work within the Permanent Bureau, most likely in the field of family law and child protection (in particular the*Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the*Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*).

Requirements:

- While the job is located in The Hague, it requires regular travel to both near and distant countries.
- Medical clearance is required.
- Finalists will be required to undergo a professional assessment administered by an external consultant.
- For more information on the process of appointment for a diplomat lawyer (Secretary) see Article 5 of the Statute of the Organisation.

Duration of the appointment: initially three years (with a six-month probationary period).

Salary: The position contemplated for the staff member corresponding to the profile would be either grade A3 or A4 of the Co-ordinated Organisations scale for the Netherlands, depending on qualifications and experience.

Entry on duty: between July and September 2014.

Applications: Written applications with a *curriculum vitae*, including publications and contact information for three references, should be addressed by email (secretariat@hcch.net) to the Secretary General of the Hague Conference on Private International Law, **before 1 April 2014**.

2

Legal Officer (full-time)

He or she will work mainly in the area of international legal and administrative co-operation and be part of a small team, under the direction of the Secretary General. The Legal Officer will primarily carry out work relating to the relevant Hague Conventions (in particular the Apostille, Service, Evidence, and Access to Justice Conventions).

Duties will include comparative research, preparation of research papers and other documentation, assistance in the preparation (including proof-reading) of materials for publication (in particular Practical Handbooks), assistance in answering requests from States for information relating to the relevant Conventions, assistance in the preparation of meetings (including Special Commission meetings), assistance in the preparation of and participation in conferences, seminars and training programmes, and such other work as may be required by the Secretary General from time to time.

The successful applicant will possess the following qualifications:

- a good knowledge of private international law, particularly in the areas of legal and administrative co-operation and international civil procedure, familiarity with comparative law and public international law is desirable;
- excellent language skills (oral and drafting) in at least one official language of the Hague Conference (English or French), as well as a good working knowledge of the other (knowledge of a third language is an asset);
- sensitivity with regard to different legal cultures;
- two to four years of relevant subject-matter experience in private practice, public service or academia.

Starting date: May 2014.

Grade (Hague Conference adaptation of Co-ordinated Organisations scale): A/1 subject to relevant experience.

Deadline for applications: 15 March 2014.

Applications should be made by e-mail, with Curriculum Vitae, letter of motivation and contact details for at least two references, to be addressed to the Secretary General, at: secretariat@hcch.net.

French Supreme Court Rules in Pinckney

On 22 January 2014, the French supreme court for civil and criminal matters (*Cour de cassation*) delivered its decision after the *Pinckney* ruling of the Court of Justice of the European Union.

The claim before French courts was one of copyright infringement against an Austrian company for manufacturing CDs which were later sold on the internet by an English company.

The French supreme court held that the accessibility of the website of the English company in France suffices to found the jurisdiction of French courts over the Austrian company as the alleged loss was suffered in France:

> *l'accessibilité, dans le ressort de la juridiction saisie, d'un site Internet commercialisant le CD argué de contrefaçon est de nature à justifier la compétence de cette juridiction, prise comme celle du lieu de la matérialisation du dommage allégué.*

For years, the Court had ruled that mere accessibility of a website in France was not enough to grant jurisdiction to French courts, and that directed activity had to be demonstrated. Time will tell whether the Court will also give up the directed activity test under the French common law of international jurisdiction.

First Issue of 2014's ICLQ

The first issue of *International and Comparative Law Quarterly* for 2014 includes several pieces on private international law.

Articles

- Elizabeth B Crawford & Janeen M Carruthers, *Connection and Coherence Between and Among European Instruments in the Private International Law of Obligations*

This article considers points of connection and coherence between and among the Rome I Regulation, the Rome II Regulation, and Regulation 1215, and relevant predecessor instruments. The degree of consistency in aim, design and detail of conflict of laws rules is examined, vertically (between/among consecutive instruments) and horizontally (across cognate instruments). Symbiosis between instruments is explored, as is the interrelationship between choice of court and choice of law. Disadvantaged parties, and the cohesiveness of their treatment under the Regulations, receive particular attention.

- Jack Wass, *The Court's In Personam Jurisdiction in Cases Involving Foreign Land*

The Moçambique rule provides that an English court may not adjudicate on title to foreign immovable property. This article considers the primary exception to that rule: where the court assumes jurisdiction in personam to enforce a contractual or equitable claim concerning foreign immovable property against a defendant subject to the court's personal jurisdiction. It addresses two questions: how should the English court decide whether to assume jurisdiction in relation to foreign land, and if the positions are reversed, should an English court recognize or enforce the order of a foreign court affecting English land? As to the first question, this article argues that the orthodox English approach is anachronistic. English law applies the lex fori exclusively to determine whether an obligation exists which the court has jurisdiction to enforce. Instead, modern conflict of laws principles demand that the court should apply the proper law of the substantive claim in determining whether a sufficient equitable or contractual obligation exists. As to the second question, this article argues that despite the prevailing view that foreign non-money judgments are not enforceable in England, foreign orders in relation to English land are in principle entitled to recognition in a subsequent action in England by the successful claimant.

Shorter Articles and Notes

- David Kenny, Re Flightlease: *The 'Real and Substantial Connection' Test for Recognition and Enforcement of Foreign Judgments Fails to Take Flight in Ireland*

The common law rules for recognition and enforcement of foreign judgments were radically reformulated by the Canadian Supreme Court in Beals v Saldanha. Few other common law jurisdictions have considered whether or not to follow Canada in this development in private International Law. In 2012, the Irish Supreme Court definitively rejected the Canadian approach. This note examines the judgment in that case, and assesses the reasoning of the Irish Court.

Hague Conference Special Commission on the Service of Process, Evidence and Access to Justice Conventions (Questionnaires)

At its meeting of April 2012 and 2013 the Council on General Affairs of the HCCH agreed for work to be undertaken with a view to preparing a meeting of the Special Commission on the practical operation of the Service of Process, Evidence and Access to Justice Conventions, in May this year. With this aim the Permanent Bureau has elaborated three questionnaires as a follow up of those prepared in 2008 in view of the previous Special Commision meeting, held in 2009, to ensure that the basic information then gathered is up-to-date. States -both contracting and non-contracting- are requested to answer by **7 March 2014**.

Clik here to see the questionnaires.